No. 94-562

In The

Supreme Court of the United States

October Term, 1994

LESLIE WILTON, ON BEHALF OF HIMSELF AND AS A REPRESENTATIVE OF CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, AND CERTAIN INSTITUTE OF LONDON UNDERWRITERS COMPANIES, AS FOLLOWS, THE ORION INSURANCE COMPANY, PLC, SKANDIA U.K. INSURANCE PLC, THE YASUDA FIRE & MARINE INSURANCE COMPANY OF EUROPE, LTD., OCEAN MARINE INSURANCE CO., LTD., YORKSHIRE INSURANCE CO., LTD., MINSTER INSURANCE CO., LTD., PRUDENTIAL ASSURANCE CO., LTD., PEARL ASSURANCE PLC, BISHOPSGATE INSURANCE LTD., HANSA MARINE INS. CO. (UK) LTD., VESTA (UK) INS. CO., LTD., NORTHERN ASSURANCE CO., LTD., CORNHILL INSURANCE CO., LTD., SIRIUS INSURANCE CO., (UK) LTD., SOVEREIGN MARINE & GENERAL INSURANCE CO., TOKIO MARINE & FIRE INSURANCE (UK) LTD., TAISHO MARINE & FIRE INSURANCE CO. (UK) LTD., STOREBRAND INSURANCE CO. (UK) LTD., ATLANTIC MUTUAL INSURANCE CO., ALLIANZ INTERNATIONAL INSURANCE CO., LTD., AND WAUSAU INSURANCE CO. (UK) LTD.,

versus

Petitioners,

SEVEN FALLS COMPANY, MARGARET HUNT HILL, ESTATE OF A. G. HILL, LYDA HILL, ALINDA H. WIKERT, AND U.S. FINANCIAL CORP.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

I. In reviewing a decision by a district court to abstain from exercising diversity jurisdiction in a declaratory judgment action, should the court of appeals determine the abstention issue *de novo*?

II. May a federal district court with diversity jurisdiction over a declaratory judgment action abstain from exercising that jurisdiction in light of a later-filed action in a state court, ignoring the unflagging obligation to exercise jurisdiction and without considering the exceptional circumstances factors of *Colorado River* and *Moses H. Cone*?

III. Because a searching review of the *Colorado River-Moses H. Cone* factors reveals no exceptional circumstances, did the district court and the court of appeals err in allowing the stay, considering the virtually unflagging obligation to exercise jurisdiction?

LIST OF PARTIES

All Petitioners named in the caption of this case were parties plaintiff to the proceedings below and constitute all those that have a direct interest in the judgment sought to be reviewed; Petitioners' corporate parents and nonwholly owned subsidiaries include:

1. ING Group NV (Netherlands), ultimate parent of The Orion Insurance Company, PLC;
2. Skandia Group (Sweden), ultimate parent of Skandia U.K. Insurance PLC;
3. Yasuda (Japan), ultimate parent of The Yasuda Fire & Marine Insurance Company of Europe, Ltd.;
4. Commercial Union PLC, ultimate parent of Ocean Marine Insurance Co., Ltd.;
5. General Accident PLC, ultimate parent of Yorkshire Insurance Co., Ltd.;
6. Societe Centrale du Groupe des Assurances Nationales, ultimate parent of Minster Insurance Co., Ltd.;
7. Prudential Corporation PLC, ultimate parent of Prudential Assurance Co., Ltd;
8. Australian Mutual Provident Society, ultimate parent of Pearl Assurance PLC;
9. AMEV (Netherlands), ultimate parent of Bishopsgate Insurance Ltd.;
10. Trygg Hansa SSP Holding (Sweden), ultimate parent of Hansa Marine Ins. Co. (UK) Ltd.;

LIST OF PARTIES – Continued

11. Skandia Group (Sweden), ultimate parent of Vesta (UK) Ins. Co., Ltd.;
12. Commercial Union PLC, ultimate parent of Northern Assurance Co., Ltd.;
13. Allianz AG Holding (Germany), ultimate parent of Cornhill Insurance Co., Ltd.;
14. ASEA Brown Boveri (Switzerland), ultimate parent of Sirius Insurance Co., (UK) Ltd.;
15. Willis Corroon PLC, ultimate parent of Sovereign Marine & General Insurance Co.;
16. Tokio Marine & Fire Insurance Co., Ltd. (Japan), ultimate parent of Tokio Marine & Fire Insurance (UK) Ltd.;
17. Mitsui Marine & Fire Insurance Co., Ltd. (Japan), ultimate parent of Taisho Marine & Fire Insurance Co. (UK) Ltd.;
18. UNI Storebrand (Norway), ultimate parent of Storebrand Insurance Co. (UK) Ltd.;
19. Atlantic Mutual Insurance Co. of New York, ultimate parent of Atlantic Mutual Insurance Co.;
20. Allianz AG Holding (Germany), ultimate parent of Allianz International Insurance Co., Ltd.;
21. Employers Insurance of Wausau (U.S.A.), ultimate parent of Wausau Insurance Co. (UK) Ltd.;

LIST OF PARTIES – Continued

22. London & Overseas Insurance Co. PLC, a subsidiary of The Orion Insurance Company, PLC;

23. Contingency Insurance Company, Ltd., a subsidiary of Minster Insurance Co., Ltd.;

24. GAN North America Inc., an associated company of Minster Insurance Co., Ltd.;

25. Prudential Life of Ireland Ltd., a subsidiary of Prudential Assurance Co., Ltd;

26. Prudential Vita SPA (Italy), a subsidiary of Prudential Assurance Co., Ltd;

27. Hallmark Insurance Company Ltd., a subsidiary of Pearl Assurance PLC;

28. Leadenhall Insurance Ltd., a subsidiary of Bishopsgate Insurance Ltd.;

29. Hansa General Insurance Co. (UK) Ltd., a subsidiary of Hansa Marine Ins. Co. (UK) Ltd.;

30. Allianz Cornhill Insurance (Far East) Ltd. (Hong Kong) a subsidiary of Cornhill Insurance PLC;

31. Holding Cornhill France SA, a subsidiary of Cornhill Insurance PLC;

32. Cornhill France SA, a subsidiary of Cornhill Insurance PLC;

33. Themis SA (France), a subsidiary of Cornhill Insurance PLC;

34. Sovereign Insurance (UK) Ltd., a subsidiary of Sovereign Marine & General Insurance Co.; and

LIST OF PARTIES – Continued

35. Norden Insurance Co. (UK) Ltd., a subsidiary of Storebrand Insurance Co. (UK) Ltd.

Petitioners' Counsel:

MEYER ORLANDO & EVANS$_{PC}$
Michael A. Orlando
Patrick C. Appel
Paul LeRoy Crist

Respondents named in the caption of this case were the remaining parties to the proceedings below and so constitute the other individuals and entities that have a direct interest in the judgment sought to be reviewed; Respondents' Counsel below were:

HAYNES & BOONE
Werner A. Powers
Charles C. Keeble, Jr.

The parallel litigation subsequently filed by Respondents, *inter alia*, in Texas state court, after amendment, involves the following parties:

1. Sherman Hunt;

2. Stuart Hunt;

3. Hara Hunt;

4. Hilre Hunt;

5. Texana Resources Corporation;

6. Silco, Inc.;

LIST OF PARTIES – Continued

7. Headwaters Oil Company;

8. Tribal Drilling Company;

9. Chester J. Donnally, Trustee of the Margaret Hunt Hill-A.G. Hill Trust, the Elisa Margaret Hill Trust, the Heather Victoria Hill Trust, the Cody McArthur Wikert Trust, the Margretta Hill Wikert Trust, the Michael Bush Wisenbaker, Jr. Trust, and the Wesley Hill Wisenbaker Trust;

10. Planet Indemnity Company; and

11. Underwriters Indemnity Company.

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LESLIE WILTON, ON BEHALF OF HIMSELF AND AS A REPRESENTATIVE OF CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, AND CERTAIN INSTITUTE OF LONDON UNDERWRITERS COMPANIES, AS FOLLOWS, THE ORION INSURANCE COMPANY, PLC, SKANDIA U.K. INSURANCE PLC, THE YASUDA FIRE & MARINE INSURANCE COMPANY OF EUROPE, LTD., OCEAN MARINE INSURANCE CO., LTD., YORKSHIRE INSURANCE CO., LTD., MINSTER INSURANCE CO., LTD., PRUDENTIAL ASSURANCE CO., LTD., PEARL ASSURANCE PLC, BISHOPSGATE INSURANCE LTD., HANSA MARINE INS. CO. (UK) LTD., VESTA (UK) INS. CO., LTD., NORTHERN ASSURANCE CO., LTD., CORNHILL INSURANCE CO., LTD., SIRIUS INSURANCE CO., (UK) LTD., SOVEREIGN MARINE & GENERAL INSURANCE CO., TOKIO MARINE & FIRE INSURANCE (UK) LTD., TAISHO MARINE & FIRE INSURANCE CO. (UK) LTD., STOREBRAND INSURANCE CO. (UK) LTD., ATLANTIC MUTUAL INSURANCE CO., ALLIANZ INTERNATIONAL INSURANCE CO., LTD., AND WAUSAU INSURANCE CO. (UK) LTD.,

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONERS

Petitioners respectfully pray that the Court will reverse the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on June 29, 1994, and remand the cause to the District Court for the Southern District of Texas, Houston Division for further proceedings on the merits.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit was not originally reported, and is reprinted at J.A. 27-30. It is now available electronically as 1994 WL 705045 on Westlaw.

The opinion of the District Court for the Southern District of Texas is not reported, and is reprinted at J.A. 23-26.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254. The decision of the Court of Appeals for the Fifth Circuit was rendered on June 29, 1994. A petition for a writ of certiorari was timely filed on September 26, 1994; this Court granted certiorari on November 28, 1994.

This case was originally filed in the United States District Court for the Southern District of Texas. Diversity jurisdiction, 28 U.S.C. § 1332, was asserted and relief was sought under the Declaratory Judgment Act, 28 U.S.C. § 2201(a). This case was appealed to the United States

Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1291.

STATUTE INVOLVED

28 U.S.C. § 2201(a). Declaratory Judgment Act.

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

This appeal arises out of an insurance coverage dispute between various oil and gas interests, including Seven Falls Company, Margaret Hunt Hill, Estate of A. G. Hill, Lyda Hill, Alinda H. Wikert, and U. S. Financial Corporation ("the Hills" or "Respondents"), and their insurers, including Petitioners Leslie Wilton, on behalf of himself and as representative of certain Underwriters at Lloyd's of London, and certain member companies of the Institute of London Underwriters ("Underwriters" or "Petitioners"). The subject of the dispute is a judgment of the Winkler County, Texas court against the Hills for $110 million, for which they seek coverage under Underwriters' policies. RII 18; RI 262.

On July 31, 1992, Underwriters declined to defend the Hills against claims being asserted in two nearly identical lawsuits pending in Texas courts, because the policies in question provided no coverage.[1] One of these underlying suits proceeded to trial in September 1992; in November 1992 the jury returned a verdict against the Hills, *inter alia*, in excess of $110 million on claims of breach of contract, tortious interference with contract, and slander of title. On November 24, 1992, the Hills advised Underwriters of the adverse jury verdict by a one-sentence letter.[2] No demand for coverage was made at that time and no lawsuit was threatened by the Hills.

Having declined defense and coverage five months earlier and believing there to be a lingering question as to whether their policies provided coverage, Underwriters filed suit in the United States District Court for the Southern District of Texas on December 9, 1992.[3] Basing jurisdiction upon diversity of citizenship under 28 U.S.C. § 1332, Underwriters sought a declaration that their policies did not cover the Hills' liabilities from the Winkler County judgment.

In December 1992, the Hills requested that Underwriters dismiss their declaratory judgment action. The Hills represented to Underwriters that other insurers were the target of their coverage claims and that the Hills contemplated no suit against Underwriters.[4]

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[1] RI 185-88, 204 ¶ 6; RII 268 Transcript p. 3.

[2] RI 193-95, 205 ¶ 2; RII 53-58, 145-47, 150 ¶ 2.

[3] J.A. 24; RI 5, 225.

[4] Long before the Hills filed any suit against Petitioners, and indeed before they ever made claims against any of these Underwriters, the Hills were engaged in an active controversy with other insurers. RI 193-98, 205 ¶ 3, 225; RII 139-144, 150 ¶ 3; and RII 268 Transcript p. 19.

Hoping to resolve the coverage dispute amicably, without the need for judicial intervention, Underwriters voluntarily dismissed their action on January 22, 1993. Underwriters did so, however, only upon the Hills' agreement to give two weeks' notice if ever the Hills changed their position and decided to assert claims against Underwriters.

On February 23, 1993, the Hills notified Underwriters of their intention to file suit in Travis County (Austin, Texas). Accordingly, Underwriters promptly refiled their declaratory judgment action on February 24, 1993. J.A. 4 & 24.

The Hills sued other insurers in state court in Dallas County, Texas on February 24, 1993.[5] However, not until March 26, 1993 did the Hills initiate an action against Underwriters.[6] Suit was filed in Travis County over a

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[5] Suit was filed by Margaret Hunt Hill, et al., against Ronald Malcolm Pateman, certain other Underwriters at Lloyd's of London and other insurance companies on February 24, 1993, in the 298th Judicial District Court, Dallas County, Texas; none of Petitioners' policies are involved in the Dallas County action. RI 152-183, 204 ¶ 7.

[6] Cause No. 93-03542, styled *Margaret Hunt Hill, et al. v. Leslie Wilton, et al.*, in the 299th Judicial District, Travis County, Texas, has been by agreement of the parties transferred as Cause No. 93-58208, to the 133rd Judicial District Court, Harris County (Houston, Texas). This state court action seeks actual damages of $110 million, plus exemplary and punitive damages of at least $330 million. RII 122-24 ¶¶ 45-51.

month after Underwriters' present declaratory judgment action was filed and almost four months after the initial declaratory judgment action of December 9, 1992.[7] In order to prevent removal, and in a transparent attempt to make the parallel state court suit non-identical to Underwriters' declaratory judgment action, the Hills misjoined in their later Travis County suit wholly unrelated causes of action by the Winkler County co-defendants against those parties' own insurers. None of the additional plaintiffs is an insured of Underwriters; neither of the two insurers for those other parties has any relationship with any of the Hills.[8]

With the filing of their Travis County action, the Hills moved to dismiss or stay this declaratory judgment action.[9] When Underwriters responded to that motion, no action had been taken in the Travis County case beyond the Hills' filing of their original petition. J.A. 4-5. Underwriters had not yet been served with citation.[10] Underwriters' answer in the later-filed suit was made just weeks before this action was stayed.[11]

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[7] RII 120-137, 150 ¶ 5.

[8] Also named as defendants in the later-filed proceeding were the insurers for the Hunt parties, i.e., Planet Indemnity Company and Underwriters Indemnity Company, the latter of which is alleged to be a Texas corporation with its principal place of business in Harris County, Texas. RII 127-29 ¶ 32, ¶¶ 36-37, & 136.

[9] J.A. 15-22; RI 261-63.

[10] RI 212-13.

[11] J.A. 6; RI 213.

Based upon this later-filed state court action in a county of clearly improper venue (as the Hills belatedly concede), the United States District Court for the Southern District of Texas granted the Hills' motion and ordered this litigation stayed, pending the resolution by the state court of the Hills' later-filed action. J.A. 5-6, 23-26. The district court's decision to abstain recites three principal factors, namely, the possibility of piecemeal litigation, forum shopping, and a "race" to the courthouse by filing suit in anticipation of expected litigation. J.A. 25. In doing so, the district court did not apply the abstention factors this Court mandated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

On appeal, the Court of Appeals for the Fifth Circuit reviewed the district court's decision solely for abuse of discretion, and affirmed. As interpreted by the court of appeals, the "exceptional circumstances" test required by this Court in all other abstention cases is unnecessary in decisions under the Declaratory Judgment Act. J.A. 29 & 30; RII 270-71. In doing so, the court of appeals implicitly relied upon its decision in *Granite State Ins. Co. v. Tandy Corp.*, 986 F.2d 94, 97 (CA5), *cert. granted*, ___ U.S. ___, 113 S.Ct. 51, 121 L.Ed. 2d 21 (1992), *cert. dismissed*, ___ U.S. ___, 113 S.Ct. 1836, 123 L.Ed. 2d 463 (1993), wherein the Fifth Circuit specifically rejected the application of *Colorado River* and *Moses H. Cone* under a misperception of the breadth of discretion to decline to grant declaratory relief under *Brillhart v. Excess Insurance Co.*, 316 U.S. 491 (1942).

SUMMARY OF ARGUMENT

In affirming with little factual recitation, let alone a searching review, the Fifth Circuit deviated from established practice in at least seven other circuits in its deference to the district court's discretion. The Fifth Circuit is the only court of appeals which expressly has declared that a standardless decision to dismiss or stay an action for declaratory relief will be reviewed only for the district court's abuse of discretion. The Fifth Circuit has left litigants with no meaningful protection against the whim or personal disinclination of a district court.

Because an abstention decision impacts such delicate concerns as comity and the importance of federal jurisdiction, Underwriters believe the "legal" decision to abstain is reviewable *de novo*. A district court's decision to dismiss or stay a declaratory judgment action deserves *de novo* review, and the *Colorado River-Moses H. Cone* factors should be applied in that decision. In this case, the district court's substantially standardless and nearly unreviewable discretion to stay undermines the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River*, 424 U.S. at 817.

The importance of these issues extends well beyond the facts of this dispute, for the outcome here will affect the abstention doctrine broadly. A decision to abstain, except in the most extraordinary circumstances, thwarts the legislative purpose behind the jurisdictional statutes and the Declaratory Judgment Act. Declaratory judgment abstention is no different from any other type of abstention previously addressed by this Court. The analysis and

factors from *Colorado River* and *Moses H. Cone* are a template to be superimposed on *Brillhart* to provide district courts with guidance in determining whether to abstain.

The court below denied Underwriters both their right to be in a federal court, and the declaratory remedy which Congress affirmatively supplied. The only basis for this abrogation of statutory redress, infringement on legislative intent and violation of the separation of powers between the legislature and the judiciary was the court's belief that a later-filed action in another forum would likely provide Underwriters adequate opportunity to present their coverage issues. Because the state court had concurrent jurisdiction and equal competence to resolve the issues presented, the district court stayed this case and thereby rewarded the Hills' selection of an acknowledged improper venue, transparent misjoinder of parties, and inequitable abuse of Underwriters' willingness to compromise their first declaratory judgment action.

The district court essentially presumed it was appropriate to decline properly invoked jurisdiction whenever a parallel suit exists. Especially where the state court proceeding is filed after the federal declaratory judgment action – as in this case – such a *de facto* presumption runs directly counter to the principle that abstention is to be "the exception, not the rule." *Colorado River*, 424 U.S. at 812-13. Underwriters reject outright the Hills' proposition that it must be presumed that a parallel state court action, whenever filed, enjoys a preference over a declaratory judgment action. A presumption, or primary emphasis placed on certain factors to the exclusion of others, is contrary to the "informed" discretion that this Court has said should be governed by case-specific facts, weighing

each as merited by the circumstances and "with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone*, 460 U.S. at 17. The "virtually unflagging obligation" to exercise jurisdiction, tempered by the exceptional circumstances identified by *Colorado River* and *Moses H. Cone*, can not be lightly cast aside.

Applying the six *Colorado River-Moses H. Cone* factors to the district court's failure to exercise jurisdiction below, Underwriters are confident that the facts demonstrate their entitlement to go forward with their declaratory judgment action. As a matter of law, two of the three findings to support the stay of this action were clearly erroneous. The lack of forum shopping by Underwriters has been conceded by the Hills. The finding that Underwriters acted in anticipation of the Hills themselves filing suit, is also wrong, because even after commencement of Underwriters' December 1992 action, the Hills disavowed any intent to litigate coverage with Underwriters. Underwriters' first declaratory judgment action, brought four months before the state court suit was filed, was initiated without any threat or even suggestion that the Hills intended to file their own suit.

The final fact found by the court below was that piecemeal adjudication of the parties' dispute would be encouraged by this declaratory judgment action going forward. As a practical matter, however, this case involves just the kind of discrete insurance coverage issue Congress intended to be the subject of proactive litigation separate from a liability suit or other parallel claim that ostensibly would encompass the insurers' issues. Accurate focus on the specter of piecemeal litigation, additionally, reveals it is the Hills' own choice. Their filing of

multiple suits establishes that piecemeal litigation is a result of their, rather than Underwriters', actions. Hence, the finding that this action had to be stayed for fear of piecemeal adjudication is also clearly erroneous on the record presented. The Court should exercise its independent judgment on the record, and determine that exceptional circumstances justifying abstention did not exist in this case.

ARGUMENT

I. In conflict with other circuits, the Fifth Circuit reviews a district court's decision to stay deferentially for an abuse of discretion, rather than *de novo*.

In writing the recent *Mhoon* decision while sitting by designation with the Tenth Circuit, Associate Justice White, Retired, declined to address the "simmering circuit split" on the appropriate standard of review of the decision to stay or dismiss a declaratory judgment action, but seemed to acknowledge that differing outcomes in a particular case would hinge on the level of scrutiny the appellate court applied to the decision to abstain. *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 983 & n. 6 (CA10 1994). The Fifth Circuit "reviews the dismissal of a declaratory judgment action for an abuse of discretion," and so errs in giving almost total deference to the decision to abstain in a declaratory judgment action, rather than the *de novo* review this critical determination deserves. J.A. 29; RII 270; 1994 WL 705045. In doing so, the Fifth Circuit is in accord with the highly deferential review accorded by the First, the Second, the Seventh, the

Eighth and the Tenth Circuits, and in conflict with the *de novo*, "plenary" or otherwise heightened scrutiny conducted by the Third, the Fourth, the Sixth, the Ninth, the Eleventh, the Federal, and the District of Columbia Circuits.[12]

Application of any justiciability or abstention doctrine should be a question of law to be reviewed *de novo*, because of the comity and federalism concerns that are raised. Traditionally, review of ripeness, standing and other jurisprudential issues is plenary. *See Abbott Lab. v. Gardner*, 387 U.S. 136, 152-53 (1967); *Altvater v. Freeman*, 319 U.S. 359, 365-66 & n.6 (1943).[13] The judiciary enforces those rules and regulations enacted by the legislature within the limits of the Constitution and pursuant to the jurisdiction authorized by Article III and conferred by congressional grant. Any doctrine which allows abstention from those legislative mandates requires searching appellate review to assure that litigants are not deprived

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[12] *Compare Mhoon*, 31 F.3d at 983 *and A.G. Edwards & Sons, Inc. v. Public Bldg. Comm'n.*, 921 F.2d 118, 121 & n.3 (CA7 1990) *with Jackson v. Culinary School of Washington, Ltd.*, 27 F.3d 573, 579 (CADC 1994), *petition for cert. filed*, 63 U.S.L.W. 3423 (U.S. Nov. 15, 1994) (No. 94-886) *and Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208 (CA4 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1643, 123 L.Ed. 2d 265 (1993).

[13] Commentators have approached consensus that there should be *de novo* review of threshold decisions on jurisdiction. *See* 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, FEDERAL PRACTICE AND PROCEDURE, § 2759 n.22 (Supp. 1993 to 2d. ed. 1983); 6A James W. Moore, et al., MOORE'S FEDERAL PRACTICE ¶ 57.08[2] at 36-37 & nn.5-8 (Supp. 1992 to 2d ed. 1982); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 778-79 (1982); Edwin Borchard, DECLARATORY JUDGMENTS at 294 (2d ed. 1941).

of their forum and remedy absent the strongest countervailing state interests to justify a federal court's deference to a parallel proceeding. While avoidance of duplicative litigation, the concomitant waste of either court's resources, and simple wise judicial administration are important criteria guiding the exercise of federal jurisdiction, nothing in the Declaratory Judgment Act nor the diversity statute authorizes abdication of the appellate responsibility to see that "such discretion [is] exercised under the relevant standard prescribed by this Court." *Moses H. Cone*, 460 U.S. at 19.

Additionally, *de novo* review is customarily applied to appeals of injunctions, arbitration orders, and declaratory judgments when they are issued on the merits, though each form of equitable relief is vested in the "discretion" of the trial court. Like injunctive relief, the hybrid procedure for a declaration of rights is largely an equitable concern. *Eccles v. Peoples Bank of Lakewood Village*, 333 U.S. 426, 431 (1948); *Meredith v. Winter Haven*, 320 U.S. 228, 231 (1943). As the district court's equitable discretion to deny or grant an injunction is reviewed searchingly with respect to the facts and *de novo* on the ultimate conclusion, the similar declaratory remedy requires like treatment. *Winter Haven*, 320 U.S. at 235-36. There is some confusion whether a denial of declaratory relief after full trial is an original matter for the reviewing court, but the better line of authority is that there is heightened scrutiny of the decision not to grant relief. *Public Affairs Assocs. v. Rickover*, 369 U.S. 111, 112-13 (1962).

Because declining to hear a properly filed declaratory judgment action is no different from any other type of justiciability or abstention consideration for the efficient

administration of the courts, foreclosing the availability of a federal forum without appropriate appellate review makes "a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 368 (1989). *De novo* review is required of such fundamental issues on the viability of federal jurisdiction. An abuse-of-discretion or deferential intermediate standard of review is tantamount to no review of the abstention decision. The jurisdictional decision to abstain is a question of law appropriate for *de novo* review.

II. Adherence to this Court's commands regarding abstention, effectuation of Congress' intent, and other policy considerations of federalism and comity, require the *Colorado River-Moses H. Cone* presumption of jurisdiction to apply absent exceptional circumstances.

Even without the Fifth Circuit's abuse-of-discretion review, unfettered discretion seriously prejudices declaratory judgment plaintiffs' right to request a statutory remedy under standardized considerations "informed by the teachings and experience concerning the functions and extent of federal judicial power." *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 243 (1952). Absent application of a uniform standard, only decisions to stay or dismiss based on bias or capriciousness are reviewable for abuses of discretion; under the existing Fifth Circuit standard, docket congestion or mere personal disinclination

not amounting to arbitrary conduct is unreviewable, rendering the statutory declaratory judgment remedy no remedy at all.

The Court is accordingly asked to restore the efficacy of the declaratory judgment action. While exceptional circumstances might constitutionally justify abdication of the unflagging obligation to exercise jurisdiction, the judiciary may not eviscerate an affirmative remedy solely because it is more convenient to do so.[14] Virtually untrammeled discretion to abstain from providing out-of-state and foreign entities declaratory relief simply because the local claimants later sue in state court is contrary to both the diversity statute and the clear congressional mandate in the declaratory remedy. Nothing less than the continued viability of the Declaratory Judgment Act is at stake.

The well-established and universally understood factors delineated in *Colorado River* and *Moses H. Cone* must apply to a district court's decision to decline the exercise of jurisdiction under the Declaratory Judgment Act. But under current circuit authority, "a district court's discretionary, nonmerits based dismissal of a declaratory judgment action cannot be successfully challenged merely because it does not satisfy *Colorado River* abstention."[15]

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[14] *See Thermtron Prods. v. Hermansdorfer*, 423 U.S. 336, 344-45 (1976) ("But an otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason.").

[15] *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 591 & nn. 8 & 10 (CA5 1994); *accord Continental Cas. Co. v. Robsac Indus.*, 947 F.2d 1367,

This case is stayed only because of the Fifth Circuit's use of a scheme contrary to the decisions of its sister circuits and this Court.

The Fifth Circuit law is in direct conflict with the mandatory application of the *Colorado River-Moses H. Cone* factors required by the First, the Second, the Eighth, and the Eleventh Circuits.[16] In addition to the four courts of appeals which have expressly held the *Colorado River-Moses H. Cone* factors to govern declaratory judgment abstention and effectively to limit the district court's unbridled discretion under *Brillhart*, another six circuits have ruled that this Court's traditional abstention analysis governs at least some declaratory judgment contexts or that some elements of this Court's test should be considered in deciding to dismiss or stay a properly filed declaratory judgment action.[17]

1372-73 (CA9 1991). Though there is now a six-factor Fifth Circuit test for abstention from a declaratory judgment action in consideration of a parallel state court suit, there is no presumption of jurisdiction and the test omits jurisdiction over real property, precedence of filing, conflict of laws or application of federal law. *Travelers Ins. Co. v. Louisiana Farm Bureau Federation, Inc.*, 996 F.2d 774, 778-79 (CA5 1993).

[16] *Employers Ins. of Wausau v. Missouri Elec. Works, Inc.*, 23 F.3d 1372, 1374-75 (CA8 1994); *Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 915 F.2d 7, 16 (CA1 1990); *General Reinsurance Corp. v. Ciba-Geigy Corp.*, 853 F.2d 78, 81 (CA2 1988); *American Mfrs. Mut. Ins. Co. v. Edward D. Stone, Jr. & Assocs.*, 743 F.2d 1519, 1525 (CA11 1984).

[17] *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 938, 949 (CTAF 1993); *Mitcheson v. Harris*, 935 F.2d 235, 239-40 & n.2 (CA4 1992); *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265, 271 (CA3 1991) (*Burford* abstention discussing *Moses H. Cone* and *Colorado River*); *Life-Link Intern., Inc. v. Lalla*, 902 F.2d

The Hills ask this Court to ignore fifty years' intervening development in the abstention doctrine and confirm the Fifth Circuit's and the Ninth Circuit's misreading of *Brillhart* discretion. *Brillhart*, 316 U.S. at 495. Neither *Brillhart* nor any other source supports the Hills' argument that a later-filed state court suit is alone a proper basis on which to exercise the discretion to decline to entertain an otherwise appropriate declaratory judgment action. J.A. 18-20; RII 113-16. *Brillhart* itself suggested several fact-specific considerations the court on remand should weigh in deciding to dismiss or stay the federal action in favor of the state court case. Indeed, *Brillhart* remanded to the district court "in order that it may properly exercise its discretion in passing upon the petitioner's motion to dismiss this suit." *Id.* at 498.

To support their position, the Hills invoke the authority of Professor Edwin Borchard for their argument that the "obligation to decide virtually all questions within its jurisdiction is curtailed when complainants seek declaratory relief," Brief in Opposition 10; but the law review they reference, without page citation, actually argues:

> But the [district] court's discretion is ***not*** properly used when the declaratory action is dismissed . . . because the court erroneously assumes . . . that the court lacks "jurisdiction" merely because a state action for negligence is pending; or for other errors in law. There is no "discretion" to refuse to assume jurisdiction over a case which is properly before the court

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1493, 1495 (CA10 1990); *Heitmanis v. Austin*, 899 F.2d 521, 527 (CA6 1990); *Hanes Corp. v. Millard*, 531 F.2d 585, 591 (CADC 1976).

> and which is entirely appropriate for declaratory adjudication.

Edwin Borchard, *Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments*, 26 MINN. L. REV. 677, 684-85 (1942) (original emphasis; citations omitted).

Professor Borchard also wrote at a time before this Court's abstention pronouncements gave the district courts guidance as to "the propriety or impropriety of using the discretion to assume or refuse jurisdiction." *Ibid.* at 682. He urged an "effort to classify facts, and in such cases it is not improper to suggest that discretion has hardened into rule" which should govern the decision to hear a declaratory judgment action on analogous facts. *Ibid.* at 682-83. Moreover, Professor Borchard's article, arguably, advocates an exceptional-circumstances test itself. While the examples he gives in no way foreshadowed the *Colorado River-Moses H. Cone* factors, he clearly presaged the jurisprudential framework this Court has since delineated. *Ibid.* at 694-95.

The absence of a uniform test restraining a district court's unfettered discretion to decline its jurisdiction is "treason to the Constitution." *New Orleans Pub. Serv., Inc.*, 491 U.S. at 358. Abstention can be acceptable only after "a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone*, 460 U.S. at 16. The importance of both federalism and comity concerns require that district courts faced with declaratory judgment actions engage in a "carefully considered" analysis of the factors set out by this Court in *Colorado River*, 424 U.S. at 818, and *Moses H. Cone*, 460 U.S. at 26, 28.

The congressional purpose behind the Declaratory Judgment Act supports application of the *Colorado River-Moses H. Cone* analysis. Congress may not have addressed the precise question, but the legislative history indicates an attitude adverse to the Hills' argument. Congress was aware of the social utility and particularized beneficial purpose for litigants when it enacted 28 U.S.C. § 2201, even recognizing the increase in federal court caseload that might occur.[18] The legislative intent and purpose of the Declaratory Judgment Act are clear: Parties to private disputes should be able to avail themselves of the § 2201 mechanism and obtain, where appropriate, a declaration of their rights and responsibilities from a neutral forum. H.R. Rep. No. 627, 72d Cong., 1st Sess., at 2 (1932); H.R. Rep. No. 1264, 73d Cong., 2d Sess., at 2 (1934).

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[18] District judges' opposition to the legislation advanced by Professor Borchard and his Congressional sponsors centered on the new remedy's potential to burden the federal courts with new cases involving only state law; Congress considered objections on the basis of judicial economy – and flatly rejected them in favor of larger national and international objectives that merited opening the doors of the federal courts to that increased case load. Donald L. Doernberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L. REV. 529; 565-68 & n.174 (1989) (*quoting Hearings on H.R. 5623 Before a Subcomm. of the Senate Comm. on the Judiciary*, 70th Cong., 1st Sess., at 2-9, 46 (1928); S. Rep. No. 1005, 73d Cong., 2d Sess., at 3 (1934)). *See also Hearings on H.R. 10143 Before the House Comm. on the Judiciary*, 67th Cong., 2d Sess., at 15 (1922) (Remarks of Representative Earl C. Michener of Michigan concerning "many, many more cases which would not be brought before the courts if the opportunity were not given").

Congress' intent was to create a procedural vehicle open to all those presenting a jurisdictional basis and a beneficial purpose to be served by the declaration sought. All litigants have a right to maintain a suit under the Declaratory Judgment Act to secure a judgment determining the obligations and liabilities of the parties. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 243-44 (1937).[19] Deference to a later-filed state court action, simply because another forum is available, is inconsistent with the affirmative, remedial character of the right to a federal forum granted by Congress. Congress could not have intended for the Declaratory Judgment Act to be a mere invitation for the federal defendant to file a state court suit.

The equitable discretion to grant or deny the relief sought is wholly separate from the jurisdictional decision whether to abstain. While the Declaratory Judgment Act can not be used absent affirmative federal jurisdiction,

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[19] The importance of the remedy Congress enacted sixty years ago is emphasized by the fact that some states still have no declaratory judgment procedure or have only recently enacted that kind of procedure. Still others have procedural impediments. *See Cincinnati Ins. Co. v. Holbrook*, 867 F.2d 1330, 1333 (CA11 1989). Oklahoma even affirmatively denies insurers a declaratory judgment action to determine defense and coverage obligations, though every other class of litigant can avail itself of this beneficial procedure. Okla. Stat. tit. 12, § 1651. In each of these instances, the federal remedy under § 2201 is such an affirmative right that its denial is fundamental prejudice to the party invoking it, and can be justified only in exceptional circumstances. *Horace Mann Ins. Co. v. Johnson*, 953 F.2d 575, 577-79 (CA10 1991); *Farmers Alliance Mut. Ins. Co. v. Jones*, 570 F.2d 1384, 1386 (CA10), *cert. denied*, 439 U.S. 826 (1978).

where jurisdiction exists, the affirmative remedial purpose of the Act can not be denied. *Brillhart* itself refers to the federal courts' equitable factfinding obligations, distinct from their determination of "*legal issues* governing the proper exercise of their jurisdiction." *Brillhart*, 316 U.S. at 497-98 (emphasis added).

In *Moses H. Cone*, this Court described the anomalous nature of the Federal Arbitration Act, which, while not creating independent federal-question jurisdiction, nonetheless represents an important federal policy "to be vindicated by the federal courts where otherwise appropriate." *Moses H. Cone*, 460 U.S. at 25 n.32. Similarly, nothing in the Declaratory Judgment Act, nor the diversity statute, authorizes unfettered abdication of the "virtually unflagging" jurisdictional obligation, nor refutes that "such discretion must be exercised under the relevant standard prescribed by this Court." *Id.* at 19. Equally with the removal statute, nowhere in the legislative history of the Declaratory Judgment Act "did Congress express any concern about diversity actions filed *by* insurance carriers."[20]

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[20] *Northbrook National Ins. Co. v. Brewer*, 493 U.S. 6, 11-12 (1989) (although it is "somewhat anomalous for Congress to retain original diversity jurisdiction over actions by out-of-state insurers while withdrawing removal jurisdiction," the legislative mandate can neither be restricted nor broadened by the judiciary because of such incongruity). *See Hearings on H.R. 5623 Before a Subcomm. of the Senate Comm. on the Judiciary*, 70th Cong., 1st Sess., at 47-59 (1928) (listing likely declaratory judgment topics, none but two of which would in most cases raise questions of federal law).

District courts *must* hear declaratory judgment cases absent exceptional circumstances; district courts *may* decline to enter the requested relief following a full trial on the merits, if no beneficial purpose is thereby served or if equity otherwise counsels.[21] *See* S. Rep. No. 1005, 73d Cong., 2d Sess., at 2, 5 (1934); H.R. Rep. No. 627, 72d Cong., 1st Sess., at 2 (1932). On the instant coverage issues before the district court, Underwriters firmly believe that the claims in the underlying judgment are not covered or that they have policy defenses to any coverage as may exist. What Underwriters seek is a prompt declaration, at the earliest juncture, so that they can adjust their conduct accordingly. With the uncertainties settled, the legal relations of the parties then may be fixed. A speedy resolution of the coverage issues is of obvious importance to Underwriters.

Effectuating congressional intent and other policy considerations of federalism and comity, as much as

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[21] While hypothetically possible, practical experience teaches that a district court after trial on the merits will not wilfully refuse a litigant relief it has proven itself entitled to, simply because the court would have preferred to have ridden itself of the matter on jurisdictional grounds at the outset. *See Moses H. Cone*, 460 U.S. at 36 (Rehnquist, J., dissenting: "There was no reason to believe that the District Court would not have acted promptly to resolve the dispute on the merits after being reversed on the stay."). Federal jurisdiction should not be cast aside where the declaratory plaintiff in fact presents issues on which it deserves a declaration of rights and a beneficial purpose would be served by such declaration. Borchard, DECLARATORY JUDGMENTS at 279 & n. 1.

adherence to this Court's commands regarding abstention, require that the *Colorado River-Moses H. Cone* presumption of jurisdiction apply absent exceptional circumstances. *Colorado River* rejected any "doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it." *Colorado River*, 424 U.S. at 813-14. The Court has never wavered from its "fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court . . . can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964) (*Pullman* abstention). "It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it." *Winter Haven*, 320 U.S. at 237. "The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *New Orleans Pub. Serv., Inc.*, 491 U.S. at 359.

If the only restraints on a district court's discretion are that its decision to stay or dismiss a declaratory judgment action is not to be governed by bias, nor to be either arbitrary or capricious, the mere pendency of a state court action will be considered sufficient grounds to abstain. Such practice would violate the mandate that a district court not cavalierly cast aside its responsibility to resolve matters within its jurisdiction. *Id.* at 358.

Nonetheless, the Hills squarely argue that the presumption should be against the district court exercising

its declaratory judgment relief authority any time there is a parallel state court action. J.A. 18; RII 113. While neither court below expressly adopted this presumption,[22] this Court must clarify whether this position is consistent with the statutory intent and constitutional mandates. The entire insurance industry, as well as other parties who rely upon the declaratory judgment mechanism to obtain adjudication of disputes before neutral federal fora, need to know whether the declaratory judgment procedure can be denied simply by the filing of a state court case once the declaratory judgment action is commenced.

The practical consequence of this position is that district courts in the Fifth Circuit will have no obligation to exercise their jurisdiction. The *de facto* presumption entertained by the district court below and supported by the Hills' and the Ninth Circuit's position, is contrary to this Court's pronouncement that, "Abdication of the

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[22] The inference is unmistakable that the district court below indulged a *de facto* presumption that an insurer always acts preemptively in filing a declaratory judgment action, no matter how much later the insured files its own suit. *See Robsac Indus.*, 947 F.2d at 1372-73 (whether an insurer's declaratory judgment action is "filed first or second, it is reactive, and permitting it to go forward when there is a pending state court case presenting the identical issue would encourage forum shopping in violation of the second *Brillhart* principle."). The Hills' Motion to Dismiss or Stay cited this case six times, and quoted at length its "presumption that the entire suit should be heard in state court." J.A. 18-20; RII 113-16. The Hills' counsel also raised the case at some length during the dismissal-stay hearing. RII 268 Transcript pp. 24-25. This Court should reject the proposition of the Fifth and the Ninth Circuit precedents underlying the decision below.

obligation to decide cases can be justified under [the abstention] doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Colorado River*, 424 U.S. at 813. The proffered presumption will turn on its head the traditional approach that abstention is to be "the exception, not the rule."[23] The standardless decision to abstain and near presumption against the declaratory judgment plaintiff amount to an authorization to district courts to "decline to entertain such an action as a matter of whim or personal disinclination." *Rickover*, 369 U.S. at 112.

While the Court should hold the analytical framework and six factors established in *Colorado River* and *Moses H. Cone* directly applicable to abstention decisions in diversity-based cases under the Declaratory Judgment Act, Underwriters believe it is, in appropriate circumstances, necessary to consider additional factors beyond those delineated in *Colorado River-Moses H. Cone. Moses H. Cone*, 460 U.S. at 26, 28.

Additional reasons for the federal court to exercise the proper jurisdiction and refuse to stay the federal proceeding are present in this action, as well as in many other insurer declaratory judgment actions. First, this case presents a concern of international comity because of the presence of regulated entities subject to British and other nations' law. Haling foreign nationals before state

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[23] *Colorado River*, 424 U.S. at 813; *New Orleans Pub. Serv., Inc.*, 491 U.S. at 359; *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984); *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 125-28 (1968).

courts is disruptive to the conduct of sovereign relations and was the basis for providing federal jurisdiction for suits involving "citizens or subjects of foreign states." 28 U.S.C. § 1332(a). Also, extensive foreign discovery may necessitate resort to international treaties governing foreign parties' production of documents and financial information their governments may accord absolute privilege. Underwriters contend that some weight should be accorded the concern for international comity as a proper consideration in the abstention equation.

Another factor appropriate to supplement the *Colorado River* analysis in similar insurance cases is the fact that not all insurance vehicles present connected issues. Discrete and separate coverage defenses under different policy forms or in different insurance and reinsurance contexts are one example. Another example is prejudice to one group of insurers by being joined with other insurers where claims are presented for breach of the duty of good faith. In short, prejudice to the declaratory judgment plaintiff arising from confusion of issues should also be a factor in the abstention equation.

Both these considerations comport well with the existing *Colorado River-Moses H. Cone* analysis and stem from the same equitable considerations. Like choice of law and jurisdiction over property, only some cases will implicate international comity or prejudicial confusion of parties or issues. However, they are important enough in cases such as the one at bar to justify setting them apart from the existing six factors.

III. Applied to the instant facts, a searching review of the *Colorado River-Moses H. Cone* factors reveals no exceptional circumstances as to warrant a stay of this declaratory judgment action.

If the *Colorado River-Moses H. Cone* test is applied to the circumstances of this suit and the parallel state court proceeding, then the courts below erred in agreeing to stay this proceeding. When jurisdiction is properly invoked, the inquiry "is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction." *Moses H. Cone*, 460 U.S. at 25-26 (original emphasis). The Fifth Circuit not only fails to weigh the abstention criteria in light of the nearly unflagging obligation to exercise jurisdiction, but ignores the critical factors identified by this Court as establishing, in rare cases, the important countervailing state interests that warrant deference to the state court proceeding. As applied to the instant facts, there are no exceptional circumstances that would warrant declining to hear this suit.

Had the district court engaged in the correct analysis, it too could not have concluded that a stay was appropriate. Two of the three bases the district court found to justify staying this action (forum shopping and reactive filing in anticipation of litigation) were erroneous as a matter of law. The district court's final factual determination, that piecemeal litigation could be avoided by giving preference to the state court suit was also erroneous, and its ultimate conclusion untenable as a matter of law. This

Court should reverse and remand with instructions to accept jurisdiction of the proceeding.

(1) Because No Real Property is Involved, the First Factor Favors the Exercise of Jurisdiction by the District Court.

The first factor set forth in *Colorado River* is not involved in this case because there is no issue of jurisdiction over real property. The absence of a factor is equated to the *absence* of exceptional circumstances and supports the exercise of jurisdiction by the district court. *See Moses H. Cone*, 460 U.S. at 19.

(2) The Federal Court in Houston is Not an Inconvenient Forum.

The Hills have conceded that Harris County was the most appropriate venue, and that Travis County was neither convenient nor proper for this coverage dispute. Accordingly, it was clearly erroneous to find, and an abuse of discretion for the district court to hold, that Travis County was a preferred forum for litigation between these parties.

Stay of this case in favor of the Travis County proceeding resulted in the predicted venue battle (RI 220), with the case ultimately being transferred to Harris County by agreement of the parties. Travis County had no connection to either the underlying or the insurance coverage matters. Contrary to the finding of the district court that Underwriters forum shopped, Harris County is the most logical venue for a dispute over policies issued

in Houston by a broker with its sole place of business in Harris County. Harris County was the most proper and, in fact, a more convenient forum than Travis County. Consequently, this second *Colorado River* factor also directs the exercise of jurisdiction by the district court.

(3) Piecemeal Litigation is Not a Concern for the Hills.

The third *Colorado River* factor is concerned with avoiding piecemeal litigation.[24] However, all coverage claims between Underwriters and the Hills are present in this action; no other parties will be able to make claims on the policies in play, and all the Hills' primary policies for the policy year sued upon are unified in this coverage suit. Additionally, if the Hills are ever required to answer in this action, all their extracontractual claims will be mandatory counterclaims. Fed. R. Civ. P. 13a. If they plead their allegations for breach of contract and breach of the duty of good faith, all issues between these parties at issue in their later-filed state court suit will be before the court below. As between these parties, all issues will be identical.

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[24] *Colorado River*'s concern was not duplicative litigation, but piecemeal adjudication in more than one court, of a concrete, finite *res*: Colorado River water rights. *Colorado River*, 424 U.S. at 817-18. Duplicative litigation is, of necessity, present in every case involving a *Colorado River* abstention issue. *Moses H. Cone*, 460 U.S. at 14-15. The existence of a parallel state action in and of itself is not an exceptional circumstance justifying abstention. *New Orleans Pub. Serv., Inc.*, 491 U.S. at 359.

To the extent that the coverage issues now appear separately from the counterclaims the Hills have not yet raised on account of their motion pursuant to Fed. R. Civ. P. 12b, this is not the type of "piecemeal litigation" that concerned the Court in *Colorado River*. Nor would proceeding on the declaratory judgment action frustrate administration of justice by the state court.

Before the Hills may recover on their claims for alleged breaches of the duty of good faith, they must, of necessity, first establish that coverage under the policies exists. This is the very issue of Underwriters' declaratory judgment action. It is the practice in Texas to abate the claims for breach of the duty of good faith, pending resolution of the coverage issues,[25] and now Texas law requires a trifurcated process: first coverage, then breach of the duty of good faith, and only then punitive damages. *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 29-30 (Tex. 1994) (bifurcation of liability for punitive damages from award of punitive damages). In all likelihood, the entire state action would have been mooted by decision in the previously filed, further-advanced declaratory judgment action.

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[25] *United States Fire Ins. Co. v. Millard*, 847 S.W.2d 668, 672-73 (Tex. App. – Houston [1st Dist.] 1993, no writ) ("Without abatement, the parties will be put to the effort and expense of conducting discovery and preparing for trial of ["bad faith"] claims that may be disposed of in a previous trial."). *See also Northwestern National Lloyd's Ins. Co. v. Caldwell*, 862 S.W.2d 44, 46-47 (Tex. App. – Houston [14th Dist.] 1993, no writ); *Progressive County Mut. Ins. Co. v. Parks*, 856 S.W.2d 776, 779 (Tex. App. – El Paso 1993, no writ).

And even if the coverage issues were to be adjudicated "piecemeal," there is no necessarily pejorative meaning to that term. Because of the posture of the discrete coverage issues in this action and the contrived, wrongly joined, and wholly unconnected causes of action of disparate parties against a separate group of insurers, this is one of those cases where it is more efficient to try certain issues independently of a generalized conflict. "Piecemeal litigation" has always been permitted where necessary to serve the ends of justice. Historically, equity courts weighed the adequacy of the relief in the other (usually common law) forum and the burdens of piecemeal litigation on the parties. *Brillhart* itself indicated that duplicative litigation would be necessary if the defenses or claims at issue in the federal suit would be "foreclosed under the applicable substantive law" or if the parallel proceeding itself could not obtain jurisdiction over all the parties. *Brillhart*, 316 U.S. at 495. *See Moses H. Cone*, 460 U.S. at 20 & n.22 ("relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement" (original emphasis)).

Finally, the Hills are unable to complain convincingly about "piecemeal litigation." The Hills have at no time indicated any desire for unitary coverage litigation. Neither the Travis County court, nor the Harris County court to which the action has been transferred, can adjudicate all of the Hills' insurance disputes, because the Hills themselves have chosen to litigate their coverage controversies in a piecemeal fashion. It is unfair and inequitable to reward the Hills' manipulation of the Dallas and Travis County suits to thwart this previously filed, entirely proper declaratory judgment action. If the Hills were

truly concerned about piecemeal litigation, they would have sued all their insurers, including Underwriters, in their already pending action in Dallas County.

(4) The District Court Should Not Have Abstained Because Underwriters' Declaratory Judgment Action Was Filed First.

Underwriters' declaratory judgment action was filed first in an effort to clarify their rights and liabilities under the policies in a neutral federal forum before the Hills made demand on Underwriters.[26] Because nothing had occurred in the parallel litigation other than mere filing, and the state court had not yet issued citations for the commencement of service upon the defendants including Underwriters, this fully-joined federal action was due precedence. The district court erred in finding the mere filing of the Travis County action a sufficient basis to decline to hear this suit.

In addition, Underwriters' declaratory judgment action would have been first-in-time even with respect to the Dallas County action, had the Hills truly wanted to litigate in one proceeding all coverage for the underlying Winkler County verdict. In none of the three proceedings have the Hills sought a comprehensive coverage determination against all possible carriers in a unitary proceeding. Consideration of the timing involved, when

[26] The Declaratory Judgment Act provides a litigant "an equal start in the race to the courthouse," and that is fine except where all other circumstances counsel that abstention is required. *Kerotest Mfg. Co. v. C-O Two Fire Equipment Co.*, 342 U.S. 180, 185 (1952).

Underwriters filed first and *before* any post-verdict demands for defense or coverage by the Hills, tilts this fourth *Colorado River* factor decidedly against abstention.

Moses H. Cone and *Colorado River* give precedence to the first-filed suit, with no attempt to ascribe an improper motive to a federal plaintiff who takes advantage of diversity jurisdiction and the rights accorded by the Declaratory Judgment Act. *See Moses H. Cone*, 460 U.S. at 13, 15-16. *Colorado River* expressly weighs the order in which the fora obtained jurisdiction in a way that current Fifth Circuit law – to the detriment of Underwriters – does not. *Colorado River*, 424 U.S. at 818.

The Hills next complain that as "natural plaintiffs" they have been denied some right, arguing that a "pre-emptive" declaratory judgment action wrested the choice of forum from them. Because the Declaratory Judgment Act was enacted to permit a party to "pre-empt" litigation, the Hills' "natural plaintiff" emphasis denies Underwriters, and all declaratory judgment plaintiffs, the affirmative means Congress provided to avoid having to wait until the "natural plaintiff" finally files suit.[27] This Court has previously held that, "It is immaterial that frequently, in the declaratory judgment suit, the positions

[27] Charles A. Wright, LAW OF FEDERAL COURTS § 100, at 712-13 (5th ed. 1994); *see Provident Tradesmens*, 390 U.S. at 127 (abstention inappropriate where federal declaratory judgment plaintiff would otherwise "have been compelled to wait upon the convenience of [state court] plaintiffs over whom it had no control"). *See also* Edwin Borchard, *The Declaratory Judgment – A Needed Procedural Reform, Part II*, 28 YALE L.J. 105, 131 (1918) (the absence of a procedure for construction of a contract in advance of its breach is a "crudity").

of the parties in the conventional suit are reversed; the inquiry is the same in either case." *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Furthermore, "a federal court's disposition of such a case may well affect, or for practical purposes pre-empt, a future – or, as in the present circumstances, even a pending – state-court action. But there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." *New Orleans Pub. Serv., Inc.*, 491 U.S. at 373.

(5) Application of Texas Law in a Federal Case Based on Diversity is Not an Exceptional Circumstance Favoring Abstention.

The fifth abstention factor is governing law, which the Fifth Circuit does not even consider. *Travelers Ins.*, 996 F.2d at 778-79; *Granite State*, 986 F.2d at 97 & n.5; *Rowan Cos., Inc. v. Griffin*, 876 F.2d 26, 29 (CA5 1989). Where federal law provides the rule of decision or a federal question is implicated, this factor can only militate in favor of jurisdiction, never for abstention. *Moses H. Cone*, 460 U.S. at 14. Since many of the abstention decisions in declaratory judgment cases involve admiralty and maritime insurance matters, patents, trademarks, and the copyright laws, absence of choice of law as a consideration in the abstention equation should be fatal to the current Fifth Circuit test.

While Underwriters admit that no federal issues or interest are implicated in this coverage dispute, invocation of diversity jurisdiction is not a factor to be weighed for, or against, the convenience of the parties or the

adequacy of the parallel proceedings. *Id.* at 13-18; *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909). The purpose of the diversity statute, 28 U.S.C. § 1332, as well as of the Declaratory Judgment Act, would be undermined if this Court allows district courts to stay or dismiss an action each time a parallel state court action is filed – simply because no federal statute or issue is in play. The district court should have exercised jurisdiction because the application of state law is not a sufficient exceptional circumstance to warrant abstention and "Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *New Orleans Pub. Serv., Inc.*, 491 U.S. at 359; *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922).

(6) The Federal Forum is Better Suited to Adjudicate the Matter and to Protect Underwriters' Rights.

On the final *Colorado River-Moses H. Cone* factor, Underwriters concede that the state court is competent to address the legal issues at the heart of this declaratory judgment action. However, state court competence to handle the legal issues is not the question; only if the state court is demonstrably *better qualified* to handle an action does this factor support abstention. *Moses H. Cone*, 460 U.S. at 26-28. Inadequacy of the Travis County court to adjudicate this dispute is raised by the previously discussed joinder and venue problems, however. As the Hills now concede that Travis County was an improper forum, Underwriters clearly prevail on this issue.

The second inadequacy of the parallel proceeding is that Underwriters face a significantly longer wait until trial in the state court. Not only have the joinder of unrelated parties and causes of action made extra discovery very likely, but additionally, joinder will require extraneous motion practice. Underwriters will also face delay simply because the state courts are not as efficiently moving their dockets,[28] as are the district courts in the Southern District of Texas since the reforms of 1989.[29]

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[28] National Center for State Courts, *State Court Caseload Statistics, Annual Report 1992* § 8, at 2, 12-13 (1994) (with 83 times as many criminal and 41 times as many civil cases, but only 15 times as many judges as the federal judiciary, state courts are unable to deal with their congested dockets, especially as increases in the federal diversity amount mean that new "filings are rising much more rapidly in state courts than in federal courts.").

[29] According to the Administrative Office of the United States Courts, the Southern District of Texas tries some three percent of all cases filed; of those three percent of cases tried, the median time interval between filing and trial disposition is only 21 months. Furthermore, the Southern District of Texas disposes of roughly three-quarters of all civil cases before the pretrial stage, with the median time between filing and disposition of just eight months. Administrative Office of the United States Courts, *1993 United States Courts: Selected Reports*, Appendix C-5 to the Annual Report of the Director, at 85 (1993) (cases pending have decreased each of the last four years for the federal courts nationwide, and in the last three years in the Southern District of Texas, while federal courts generally and specifically the Southern District have cleared more cases than have entered their dockets for three of the last five years). *See also* Federal Judicial Center, *Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges* 4, 26 & 33 (1994) (citing perceived bias and delay as prime reasons litigants with a choice would opt for a federal forum).

The state forum is inadequate in two other respects. This case involves foreign parties. The coverage issues may, and the extracontractual issues certainly will, involve extensive foreign discovery. The need to resort to international treaties governing foreign discovery indicates a disadvantage to having this case in state court. Additionally, Underwriters' rights and privileges from disclosure will be better respected in federal court than in state court discovery, where sanctions can include dismissal or default for failure to produce financial records. Tex. R. Civ. P. 215(2)(b)(5).

In state court, Underwriters also may be unable to obtain summary judgment on their coverage obligations and defenses, even though those issues are preliminary matters under Texas law to the action for a breach of the duty of good faith. While coverage must necessarily be resolved before alleged breaches of the duty of good faith are reached, Texas practice is still to submit to the jury the operative facts dispositive of the coverage question.[30]

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[30] The Texas Supreme Court has made the contrast in summary judgment practice truly stark: "In the federal system, '[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules.' . . . Texas law, of course, is quite different. While the language of our rule is similar, our interpretation of that language is not. We use summary judgments merely 'to eliminate patently unmeritorious claims and untenable defenses,' and we never shift the burden of proof to the nonmovant unless and until the movant has 'establish[ed] his entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law.' . . . While some commentators have urged us to adopt the

In the federal proceeding, the coverage issues could be resolved on Underwriters' motion for summary judgment, thereby making the parallel state court proceeding unnecessary. Judicial economy was disserved when the district court granted the stay of this fully joined federal contest in favor of a weeks' old proceeding.

The final inadequacy of the Texas action is the misjoinder of disparate parties' separate causes of action against their own insurers with the Hills' claims against Underwriters. Joining the Hills' claims against Underwriters with the claims of different insureds against separate domestic carriers for alleged breaches of the duty of good faith will undoubtedly prejudice Underwriters. The Hills evidently hope that the various insurers' alleged misdeeds will be lumped together in the factfinders' minds. By confusing the issues, the Hills obviously desire to taint one group of insurers, Petitioners, with the conduct of the

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current federal approach to summary judgments generally, *e.g.*, Hittner & Liberato, *Summary Judgments in Texas*, 20 St. Mary's L.J. 243, 303-05 (1989), we believe our own procedure eliminates patently unmeritorious claims while giving due regard for the right to a jury determination of disputed fact questions." *Casso v. Brand*, 776 S.W.2d 551, 556-57 (Tex. 1989) (citations omitted). *See also* David Hittner, Lynne Liberato, & Bruce Ramage, Summary Judgments and Defaults in the State Courts of Texas § A(4) (High Reversal Rate for Summary Judgments), at 3 & § I (State Contrasted with Federal Summary Justice Practice), at 56-58 (1992).

other group of insurers, where the Hills are not even advancing claims against those other defendants.[31]

Even if the state court proceedings were adequate to determine Underwriters' rights and liabilities under the policies, an exercise of jurisdiction by the district court was compelled because of the lack of exceptional circumstances under *Colorado River* and *Moses H. Cone*. This adequate-forum consideration focuses attention on the comprehensiveness and legitimacy of the state court action, and is addressed from the perspective of retaining jurisdiction. This factor does not require that the state forum be *inadequate* for the exercise of jurisdiction, because an inadequate parallel action *mandates* the exercise of federal jurisdiction. *Moses H. Cone*, 460 U.S. at 28.

The two additional considerations *Moses H. Cone* added to the abstention equation never weigh against retaining jurisdiction. *Moses H. Cone*, 460 U.S. at 26, 28. The choice-of-law and adequate-forum factors only provide additional reasons for retaining jurisdiction. So the lack of such issues in a diversity action would not, alone,

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[31] Here, no pro-abstention weight can properly be afforded the Hills' joinder in the Travis County suit of the Hunts' claims against other insurers, where Petitioners wrote no coverage for nor have any connection with, the additional Travis County plaintiffs; these Hunt plaintiffs do not, and could not, assert any claims or rights against these Underwriters. RII 126 ¶¶36-37, 136; RII 268 Transcript pp. 7-8 & 23-24. Nor do Petitioners have any relationship (related to this dispute) with those other, domestic insurers. Consequently, any additional parties present in the Travis County action in no way present related issues to the coverage Petitioners provided or to Petitioners' handling of the Hills' claims. RII 268 Transcript pp. 7-8 & 23-24.

be a sufficient reason to abstain. If it were, not only the Declaratory Judgment Act, but also the diversity statute, would be rendered nugatory. Even if the Court believes Underwriters' rights and interests might be sufficiently protected in the Texas state court, no weight in favor of abstention is found. As a final point, the Hills can not even allege an inadequacy of the federal forum to adjudge the coverage questions at issue in this action.

CONCLUSION

For these reasons, the Court should determine that the courts of appeals review *de novo* the decision to dismiss or stay a declaratory judgment action, which determination must include a consideration of the *Colorado River-Moses H. Cone* test. This Court should reverse the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on June 29, 1994, and, pursuant to 28 U.S.C. § 2106, remand the cause to the District Court for the Southern District of Texas, Houston Division, and order that it accept jurisdiction.

Respectfully submitted,

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